# PhileoAllied Bank (M) Bhd v Koshish Credit & Leasing Sdn Bhd

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MT3-24-197 OF 1999
LOW HOP BING J
30 AUGUST 2001

***Banking*** *— Banks and banking business — Merger of banks — Vesting of chargee bank's properties in third party bank — Effect of non registration of vesting order on enforcement of charges — Whether charge must be registered in name of third party bank before it could be enforced — Interpretation of s 50(3) of BAFIA in the light of s 420 of the National Land Code 1965 — Banking and Financial Institutions Act 1989 ss 50(1) & (3)*

***Civil Procedure*** *— Parties — Substitution of parties — Vesting order, effect of — Whether parties must be properly substituted before proceedings may proceed — Interpretation of s 50(3) of BAFIA in the light of s 420 of the National Land Code 1965 — Rules of the High Court 1980 O 15 r 7(2) — Banking and Financial Institutions Act 1989 ss 50(1) & (3)*

***Land Law*** *— Charge — Enforcement of — Vesting of chargee bank's properties in third party bank — Failure to register vesting order — Effect of vesting order on enforcement of charges — Whether charge must be registered in name of third party bank before it could be enforced — Interpretation of s 50(3) of BAFIA in the light of s 420 of the National Land Code 1965 — Banking and Financial Institutions Act 1989 ss 50(1) & (3)*

The plaintiff commenced foreclosure proceedings against the defendant on the basis of a registered charge over landed property ('the registered charge') pursuant to s 256 of the National Land Code 1965 ('the NLC'). The defendant raised a preliminary objection on the ground that the plaintiff had failed to comply with a vesting order vesting the plaintiff's properties in Malayan Banking Bhd ('the vesting order'). The defendant sought an order that the plaintiff's originating summons be struck out or stayed until the plaintiff had fully complied with the vesting order. The defendant's contention was that the plaintiff could not proceed with the originating summons until the registered charge had been registered in the name of Malayan Banking Bhd by filing the vesting order with the appropriate land authority as provided for under s 420 of the NLC. Section 420(1) of the NLC provides that notwithstanding anything in other written law, no order of the court vesting an alienated land shall affect the land until it has been registered pursuant to that section.

**Held**, dismissing the defendant's preliminary objection with costs:

(1) Section 50(3) of the Banking and Financial Institutions Act 1989 ('the BAFIA') expressly provides that the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law. Since s 420 of the NLC was already in existence at the time when s 50(3) of the BAFIA was enacted, the

intention of Parliament was that the words 'shall have effect accordingly to its terms notwithstanding anything in any law or in any rule of law' under s 50(3) of the BAFIA must mean that the vesting order shall take effect despite the provisions contained in s 420(1) as s 420(1) is clearly and unambiguously overridden by s 50(3). In other words, s 50(3) of the BAFIA which was enacted some 24 years later prevails over s 420(1) of the NLC (see pp 250A, 251A–B).

(2) As a general rule, where the rights under a charge have been vested into another party (the successor party), that successor party must be substituted as plaintiff under O 15 r 7(2) of the Rules of the High Court 1980 ('the RHC') and the relevant charge must be transferred and registered in the name of that other party pursuant to the NLC. However, the vesting order is all encompassing and s 50(3) of the BAFIA allows these proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd, thereby prevailing over or superseding the provisions of both the RHC and the NLC. Para B (vxi) and (xvii) of the vesting order merely directed the proper land registering authority to accept and register the vesting order, but they did not provide that the transfer of the registered charge was subject to such registration (see pp 251D–E, G–H, 253A–B).

**[Bahasa Malaysia summary**

Plaintif telah memulakan prosiding penjualan terhadap defendan di atas dasar gadaian berdaftar di atas hartanah menurut s 256 Kanun Tanah Negara 1965 ('KTN') ('gadaian berdaftar tersebut'). Defendan telah membangkitkan bantahan awal kerana plaintif gagal mematuhi perintah letakhak yang dibuat untuk meletakhak hartanah plaintif di dalam Malayan Banking Bhd ('perintah letakhak tersebut'). Defendan telah memohon supaya saman pemula plaintif dibuang dengan kos atau digantungkan sehingga plaintif mematuhi perintah letakhak tersebut. Pertikaian defendan adalah bahawa plaintif tidak boleh meneruskan saman pemulanya sehingga gadaian berdaftar tersebut telah didaftarkan dalam nama Malayan Banking Bhd dengan memfailkan perintah letakhak tersebut dengan pihak berkuasa tanah yang sesuai seperti yang diperuntukkan dalam s 420 KTN. Seksyen 420(1) KTN memperuntukkan bahawa tanpa mengambilkira undang-undang yang lain, tiada perintah mahkamah meletakhakkan tanah berimilik akan mempengaruhi tanah tersebut sehingga ia didaftarkan menurut seksyen tersebut.

**Diputuskan, menolak bantahan awal defendan dengan kos:**

(1) Seksyen 50(3) Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA') memperuntukkan bahawa perintah letakhak tersebut

'shall have effect according to its terms notwithstanding anything in any law or in any rule of law'. Memandangkan bahawa s 420 KTN telah wujud semasa s 50(3) BAFIA digubal, niat Parlimen bahawa perkataan-perkataan 'shall have effect according to its terms notwithstanding anything in law or in any rule of law' di bawah s 50(3) BAFIA mesti bermakna bahawa perintah letakhak tersebut akan berkuatkuasa meskipun peruntukan di dalam s 420(1), kerana s 420(1) adalah dengan jelas ditolak oleh s 50(3). Di dalam perkataan lain, s 50(3) BAFIA yang digubal 24 tahun kemudian mengatasi s 420(1) KTN (lihat ms 250A, 251A–B).

(2) Sebagai peraturan am, di mana hak di bawah sesuatu gadaian telah diletakhakkan di bawah parti yang lain (parti pengganti), parti pengganti tersebut mesti dijadikan plaintif di bawah A 15 k 5(2) Keadah-Keadah Mahkamah Tinggi 1980 ('KMT') dan gadaian tersebut mesti dipindah dan didaftar di dalam nama parti yang lain menurut KTN. Walau bagaimanapun, perintah letakhak tersebut merangkumi segalanya dan s 50(3) BAFIA membenarkan prosiding-prosiding di dalam tindakan gadaian diteruskan tanpa keperluan untuk menggantikan Malayan Banking Bhd sebagai plaintif ataupun memindahkan dan mendaftarkan gadaian berdaftar di dalam nama Malayan Banking Bhd, dan oleh itu mengatasi peruntukan-peruntukan KMT dan KTN. Perenggan B (vxi) dan (xvii) perintah letakhak tersebut hanya mengarahkan pihak berkuasa pendaftaran tanah yang betul supaya menerima dan mendaftarkan perintah letakhak tersebut, tetapi perenggan-perenggan tersebut tidak memperuntukkan bahawa pemindahan gadaian berdaftar tersebut tertakluk kepada pendaftaran tersebut (lihat ms 251D–E, G–H, 253A–B).]

**Notes**

For cases on substitution of parties, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4351–4355.

For cases on enforcement of charges, see 8(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1879–1880.

**Cases referred to**

*Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614 (refd)

*Ramayah @ Ramasamy all Etican v Hussin bin Dahlan* [1993] MLJU 113 (refd)

**Legislation referred to**

Banking and Financial Institutions Act 1989 ss 50(1), (3)
Legal Profession Act 1976 s 123

National Land Code 1965 ss 256, 420(1), (2), (3), (4)
Rules of the High Court 1980 O 15 r 7 (2)
Subordinate Courts Act 1948 s 69(g)

*Chang Wei Mun* (*Lim Siew Ming*) (*Raja, Darryl & Loh*) for the plaintiff.
*Thakurdas Naraindas Jethwani* (*Thakurdas Jethwani & Co*) for the defendant.

**Low Hop Bing J:**

*Preliminary objection*

At the outset of the hearing of foreclosure proceedings by way of an originating summons in encl (1) commenced by the plaintiff on 11 February 1999 against the defendant on the basis of a registered charge over landed property pursuant to s 256 of the National Land Code 1965 ('the NLC') ('registered charge'), Mr Thakurdas Jethwani, learned counsel for the defendant, raised a preliminary objection on the ground that the plaintiff has failed to comply with the vesting order (together with all the consequential amendments) ('the vesting order') made in favour of the plaintiff in the Kuala Lumpur High Court No D9–24–27–2001. The defendant seeks an order that the plaintiffs said originating summons be struck out or stayed until the plaintiff has fully complied with the vesting order. In other words, it is said for the defendant that the plaintiff cannot proceed with the originating summons unless and until the registered charge has been registered in the name of Malayan Banking Bhd, which he added must be done by filing the vesting order with the appropriate land authority. For the purpose of this judgment, a reference to the vesting order shall include all the consequential amendments thereto.

*Common ground*

It is common ground that pursuant to an exercise pertaining to the merger of banks, the plaintiff's business and assets (which for the purposes of this judgment would include the registered charge) had been vested in Malayan Banking Bhd pursuant to the vesting order, as a result of which the plaintiff ceased to be the beneficial owner and Malayan Banking Bhd became the new owner thereof.

*Defendant's contention*

It is the defendant's contention that while complying with para (D) of the vesting order, the plaintiff however had ostensibly not complied with, *inter alia*, para (B)(xvi) and (xvii) thereof which required registration, with the relevant authority, 'for the purpose of vesting in the TRANSFEREE' the registered charge.

It was further submitted for the defendant that s 50(1) of the Banking and Financial Institutions Act, 1989 (Act 372) ('the BAFIA') provides for the vesting of any property or business and that s 50(3) of the BAFIA

thereof requires the vesting to be done in accordance with the terms of the vesting order.

The argument for the defendant is that s 50(1) of the BAFIA, covers the vesting not only of landed property and the interests therein but also the transfer of any property or business, including furniture, cars, receivables, goodwill and the like, all of which are not landed properties and so do not require registration, as vesting would take place on the transfer date prescribed in the vesting order.

In respect of landed property, the view advanced for the defendant is that under s 50(3) of the BAFIA vesting could only take effect after it has been registered with the relevant authority, in accordance with para (C) of the vesting order. Defendant also relied on s 420 of NLC for supporting the contention that the vesting order covering landed properties must be registered with the relevant authority.

*Plaintiff's response*

The short answer given by En Chang Wei Mun and Cik Lim Siew Ming, both learned counsel for the plaintiff, is that under s 50(3) of the BAFIA, the vesting order supersedes all written laws, even NLC and that the terms of the said vesting order allow the plaintiff's originating summons to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd at the appropriate land registry. In the circumstances, they are of the view that the defendant's preliminary objection is without merits.

*Decision of the court*

By way of recapitulation, the preliminary objection raised for the defendant is that the plaintiff cannot proceed with this originating summons unless and until the registered charge has been registered in the name of Malayan Banking Bhd by way of filing the vesting order in the appropriate land registry. The question is therefore whether there are merits in this preliminary objection.

The vesting order was made under s 50(1) of the BAFIA after the parties in the merger viz the transferor and the transferee institutions viz Phileo Allied (M) Sdn Bhd and Malayan Banking Bhd have made a joint application to the Kuala Lumpur High Court by way of an ex parte originating summons. Section 50(3) of the BAFIA, which must be read in conjunction with s 50(1) of the BAFIA, is of critical importance to the determination of the preliminary objection and merits reproduction as follows:

> Where the order of the High Court under sub-s (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding

anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

Section 50(3) of the BAFIA expressly provides that the vesting order 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law'. As these words are clear and unambiguous, it is the duty of the court to give effect to them as they are reflective of the intention of Parliament.

As learned counsel for the defendant relies heavily on the words of s 420(1), (2), (3) and (4) of the NLC, it is appropriate to reproduce them as follows:

(1) Notwithstanding anything in any other written law, no order of the Court vesting an alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.

(2) The Court shall, accordingly, cause a copy of any such order to be served on the Registrar or, as the case may be, Land Administrator forthwith after the making thereof; and the Registrar or Land Administrator, upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.

(3) The Registrar or Land Administrator shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.

(4) Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.

Special emphasis was placed by defendant's learned counsel on the opening words 'Notwithstanding anything in any other written law' in s 420(1) of the NLC.

In my view, s 420(1), (2), (3) and (4)of the NLC provide for the registration of vesting orders and the procedural steps which the registrar or the land administrator must take in order to effect such registration.

However, the fact is that when NLC was enacted in 1965, BAFIA had not been brought into being yet. I am therefore of the view that Parliament could not have intended s 420 of the NLC to override the provisions of s 50(1) and (3) of the BAFIA which as stated above was never in existence then. The written law referred to in s 420(1) of the NLC must be the written law in force at the time when s 420(1) of the NLC was enacted and could not include, eg s 50(1) and (3) of the BAFIA.

On the other hand, s 50(3) of the BAFIA provides that the vesting order 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law, ...'.

Since s 420 of the NLC was already in existence at the time when s 50(3) of the BAFIA was enacted, it was obvious that the intention of Parliament is that the words 'shall have effect according to its terms notwithstanding anything in any law or in any rule of law' must mean that the vesting order shall take effect despite the provisions contained in s 420(1) of the NLC, as s 420(1) of the NLC is clearly and unambiguously overridden by s 50(3) of the BAFIA. In other words s 50(3) of the BAFIA prevails over s 420(1) of the NLC. In any event, where there is an inconsistency between the provisions of two Acts of Parliament, as in s 420 of the NLC and s 50(1) and (3) of the BAFIA, the latter which was enacted some 24 years later, must prevail. In *Ramayah @ Ramasamy a/l Etican v Hussin bin Dahlan* [1993] MLJU 113, Richard Talalla J (as he then was) observed that since s 123 of the Legal Profession Act 1976 was enacted long after s 69(g) of the Subordinate Courts Act 1948, the provisions of s 123 of the Legal Profession Act 1976 must prevail if there was a conflict between them. In the circumstances, there can be no doubt in my mind that the terms of the vesting order by virtue of s 50(3) of the BAFIA would prevail over or supersede all laws including s 420(1) of the NLC.

I am mindful of a point of practice and procedure pertaining to a cause or matter eg pending charge actions. As a general rule, where the rights under a charge have been vested into another party, (the successor party), that successor party must be substituted as plaintiff under O 15 r 7(2) of the Rules of the High Court 1980 ('the RHC'); and the relevant charge must be transferred and registered in the name of that other party pursuant to the NLC.

The said O 15 r 7(2) of the RHC is reproduced as follows:

> (2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

However, in the instant case, the vesting order is all-encompassing and s 50(3) of the BAFIA allows these proceedings in a charge action to continue without the necessity of substituting Malayan Banking Bhd as the plaintiff or transferring and registering the registered charge in the name of Malayan Banking Bhd.

This is because s 50(3) of the BAFIA provides that the terms of the vesting order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, thereby prevailing over or superseding the provisions of both the Rules of the High Court 1980 and the NLC. Support for my view herein may be found in *Leong Moh Sawmill Co Sdn Bhd (in liquidation) v Standard Chartered Bank & Ors* [1996] 2 MLJ 614, where the question before the Court of Appeal was whether, in a change in the identity of the chargee, there is a need for the title of the action

to be substituted to reflect the identity of the true chargee before the auction can be enforced. Briefly, in that case, the essential fact was that there was a similar vesting order under s 50(1) and (3) of the BAFIA in which the predecessor bank had transferred and vested all its banking business in a successor bank. Pursuant to an order for sale, an auction was carried out in the name of the predecessor bank. As in this case, the Court of Appeal was asked to decide on the legal implications of s 50(3) of the BAFIA and O 15 r 7(2) of the RHC. The Court of Appeal after referring to s 50(3) of the BAFIA and O 15 r 7(2) of the RHC, held as follows:

> Thus, by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O 15 r 7(2), there may be a substitution of the proper party to continue with the proceedings. However, by virtue of the qualifying words 'notwithstanding anything in any law or in any rule of law' appearing in s 50(3) of the Act, we consider that there is no necessity for a formal order under O 15 r 7(2) to regularize the position of the successor bank.

In order to give a comprehensive coverage to the issues raised for the defendant, I shall now proceed to consider the effect of the relevant terms of the vesting order. A reference to a paragraph hereinafter is a reference to that paragraph in the vesting order.

Pursuant to para (A), the transfer of all 'Assets' was 'given effect to and granted' by the court on 1 March 2001. In the vesting order, the word 'Assets' means all assets in relation to or utilized in the banking business of the plaintiff which would naturally include the registered charge. As such, the registered charge was already transferred as at 1 March 2001.

Paragraph (B) states that 'In addition and not in derogation to para (A) above ... the following additional and/or supplemental orders and directions are made ...

It is to be noted that para B (xvi) as amended on 2 March 2001 which is relied upon by the defendant is subject to this qualification which, where relevant, reads as follows:

> (xvi) for the purpose of vesting in the TRANSFEREE pursuant to this order of any Land ... the lodging ... of this Order ... shall b accepted by the said registering authority ... and the said registering authority ... shall register this Order ... and such registration shall be effective to vest the land ... in the Transferee ... and every such registration authority is directed to carry out and give effect to the provisions of s 420(2), (3), and (4) of the National Land Code 1965.

It is clear to me that para (A) is the main order whereas para (B)(xvi) is a supplemental direction which cannot supersede the provisions of para (A). Further para (B)(xvi) does not make it mandatory or imperative for the lodgment of the vesting order with the registering authority, but if the plaintiff is minded to do so, it is mandatory for the registering authority to register the vesting order. However, para B(xvi), at the risk of repetition cannot be so construed as to override the principal order contained in para (A).

A Indeed, the whole of para (B) in general and sub para (xvi) in particular are for the purpose of facilitating the transfer of the registered charge but, as stated above, it is not a mandatory requirement. By virtue of para (A), the transfer has already taken place.

In this connection, I am of the view that para B (xvi) and also (xvii) B merely direct the proper land registering authority to accept and register the vesting order, but they do not provide that the transfer of the registered charge is subject to such registration.

My view is fortified by the other clear provisions contained in para (B) which allow the originating summons herein to proceed without transferring the registered charge to Malayan Banking Bhd. By way of C illustration, para (B) (i), (ii) and (iii) vest the registered charge; substitute the name of Malayan Banking Bhd in place of the plaintiff in respect of any instrument including the registered charge; and substitute the name of Malayan Banking Bhd in place of the plaintiff in respect of any agreement including the charge annexure, from the transfer date of 1 March 2001.

D Paragraph (B)(viii) in effect provides that the registered charge shall be held by Malayan Banking Bhd as security, while para (B)(ix) and (xii) in effect provide that the rights under the originating summons have been effectively transferred to Malayan Banking Bhd as if it had at all times been a right of Malayan Banking Bhd and enabling Malayan Banking Bhd to continue with the originating summons as if Malayan Banking Bhd had E been a party thereto instead of the plaintiff.

Furthermore, as alluded to above, in accordance with s 50(3) of the BAFIA, para (C) specifically states that the said vesting order 'shall have effect according to its terms notwithstanding anything in law or in any rule of law and shall be binding on any person thereby affected regardless that F the person so affected is not a party to those proceedings.'

The vesting order in clear and unambiguous terms states that the transfer is given effect to and granted by the court from 1 March 2001. That being the case, the property and business of the plaintiff have been vested in Malayan Banking Bhd with effect from 1 March 2001.

I therefore hold that the preliminary objection is devoid of merits and is G hereby dismissed with costs and that the originating summons shall be heard on its merits.

*Defendant's preliminary objection dismissed with costs.*

Reported by Chan Chin Chye

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